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December 11, 2000

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VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Joint Application by Southwestern Bell for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Docket No. 00-217*

Dear Ms. Salas:

Pursuant to the Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act, Public Notice No. DA 99-1994, we are enclosing the following:

- One original and two copies of a redacted Reply (in paper form). The Reply consists of two parts: (1) a Reply Brief in support of the Application; and (2) a Reply Appendix containing supporting affidavits.
- One copy of the Reply Brief and supporting affidavits with attachments on CD ROM.
- Five additional copies of the redacted Reply (in paper form and on CD ROM), so that each Commissioner may have a copy.
- One original of only the portions of the Reply that contain confidential information (in paper form). A copy of this letter will also accompany that version of the Reply. Some of the material we are submitting includes confidential information. As such, we are requesting that these portions of

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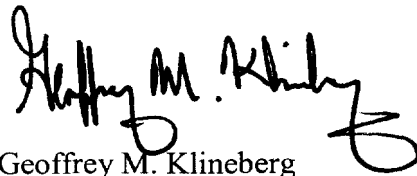
the Reply receive confidential treatment under the existing protective order in this proceeding.

Please date-stamp the extra copy of this letter and return it to the individual delivering this package.

We are also submitting under separate cover copies (redacted as appropriate) of the Reply to Janice Myles, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, Room 5-C-327, 455 12th Street, S.W., Washington, D.C. 20554. Copies are also being submitted to the Department of Justice, to the Oklahoma Corporation Commission, Kansas Corporation Commission, and to ITS (the Commission's copy contractor).

If you have any questions, please call me at 202-326-7928.

Sincerely,

A handwritten signature in black ink, appearing to read "Geoffrey M. Klineberg", with a stylized flourish at the end.

Geoffrey M. Klineberg

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of

Joint Application by SBC Communications
Inc., Southwestern Bell Telephone Company,
and Southwestern Bell Communications
Services, Inc. d/b/a Southwestern Bell Long
Distance for Provision of In-Region,
InterLATA Services in Kansas and Oklahoma

CC Docket No. 00-217

To: The Commission

**REPLY BRIEF OF SOUTHWESTERN BELL
IN SUPPORT OF INTERLATA RELIEF IN KANSAS AND OKLAHOMA**

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December 11, 2000

EXECUTIVE SUMMARY

After resolving hundreds of issues over years of contested proceedings involving SWBT and the CLECs, the Kansas Corporation Commission ("KCC") and the Oklahoma Corporation Commission ("OCC") have both enthusiastically endorsed Southwestern Bell's Joint Application to provide interLATA services in their states. The vast majority of commenters have also expressed their support, looking forward to the additional competition in the long-distance markets that Southwestern Bell's entry will bring. The evidence presented in this record overwhelmingly supports the granting of this Joint Application. After reviewing the entire record, the Department of Justice ("DOJ") has identified only two concerns, neither of which justifies denying this Joint Application.

First, the DOJ has questioned whether there is sufficient evidence in the record to support a finding that the rates established for unbundled network elements in both Kansas and Oklahoma comply with this Commission's TELRIC rules. But the DOJ is asking this Commission not only to second-guess the judgments of the KCC and the OCC, reached after literally years of analysis, testimony, and cross-examination, but also to do what this Commission has expressly disavowed – conduct a de novo review of state pricing determinations in a section 271 proceeding. Moreover, the suggestion that such a de novo review is warranted merely because the rates in Kansas and Oklahoma appear to be somewhat higher than those in Texas not only misunderstands how these rates were in fact established but is wholly inconsistent with this Commission's longstanding view that TELRIC is a methodology to be applied by each state commission, not a formula that generates specific rates. Indeed, it is not even true as a substantive matter, for when the rates are compared among geographically similar exchanges, the Kansas and Oklahoma rates may actually be lower than the rates in Texas.

In any case, both the KCC and the OCC adhered to TELRIC principles in establishing the rates. There is ample evidence in the records of both states that the recurring and non-recurring rates are cost based and that the KCC and the OCC acted entirely reasonably when adopting particular rates falling within a range of cost-based proposals. The differences among the unbundled network element ("UNE") rates in Kansas, Oklahoma, and Texas are attributable to legitimate and established differences in relevant cost inputs. The fact that the proxy rates established by the Commission for unbundled loops were 14 percent and 28 percent higher, respectively, for Oklahoma and Kansas than for Texas demonstrates that the Commission recognized that costs were higher in Oklahoma and Kansas than in Texas. Some CLECs complain that some of the cost-based rates in Kansas and Oklahoma are too high to allow them to make an unspecified level of profit, but the statute does not make profitability for each UNE or, for that matter, some subset of UNEs the standard for evaluating whether rates are just and reasonable. In any case, once they obtain a UNE, CLECs in fact obtain a revenue stream consisting of local service rates, interstate and intrastate access charges, vertical services, long distance, regulatory charges, etc.

Finally, the fact that some UNE and collocation rates in both states are interim provides no basis for denying the Joint Application. Because the interim solution is reasonable, the state commissions have demonstrated a commitment to TELRIC, and the interim rates are all subject to true-up, this Commission has already concluded that use of interim rates under these circumstances is perfectly legitimate.

Second, the DOJ has raised the question whether SWBT's operations support systems ("OSS") used by CLECs to provide service to customers in Kansas and Oklahoma are the same as those used to provide service to Texas customers. This Commission's approval of

Southwestern Bell's OSS in the Texas proceeding is reason enough to conclude that Southwestern Bell is providing nondiscriminatory access to its OSS in Kansas and Oklahoma. In addition, Southwestern Bell's assertion that its OSS operate region wide has been supported by both the KCC and the OCC, and Ernst & Young has independently verified this assertion. Indeed, in a supplemental filing that the DOJ did not review, Ernst & Young has provided additional support for its conclusions. No one has presented a single piece of evidence that calls into doubt the region-wide nature of SWBT's electronic OSS. And the manual processes for handling orders that do not flow through SWBT's electronic systems are exactly the same, regardless of where in SWBT's region a particular CLEC customer may reside.

Notwithstanding the fact that SWBT uses identical OSS interfaces as well as a common set of methods and procedures for handling both its retail and wholesale operations throughout its region, differences in performance results inevitably arise. These differences, however, are attributable not only to variations in geography, demographics, local regulations, and even the weather, but also to the sophistication and experience of particular CLECs. Whereas certain CLECs have gained significant experience ordering and provisioning service for customers in Texas, these same CLECs have chosen, for their own business reasons, not to enter the local markets in Kansas and Oklahoma. Instead, the CLECs doing business in these states are smaller, less experienced, and far more likely to experience poor results from their own mistakes. Although some CLECs have raised a variety of operational issues concerning OSS, none of their complaints has merit or calls into question SWBT's evidence that it has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and that these functions are operationally ready as a practical matter.

In addition to the two issues identified by the DOJ for further investigation, a number of CLECs have also complained about the quality of SWBT's provisioning of unbundled loops. These isolated and anecdotal complaints cannot refute objective performance data demonstrating that SWBT's overall performance in Kansas and Oklahoma satisfies the requirements of the competitive checklist. For example, this data unambiguously demonstrate that SWBT satisfies the criteria established in the Texas and New York orders for frame due time and coordinated hot cut conversions in both Kansas and Oklahoma. Moreover, SWBT has demonstrated that it provides nondiscriminatory access to a variety of different loop types, including 5.0 dB, 8.0 dB, DSL, and DS1 loops. With respect to xDSL-capable loops in particular, SWBT's performance has been at parity or better in four of the five performance categories; the lack of parity in the fifth category – percentage of missed installation dates – is largely the result of the CLECs' business decision not to order xDSL service through line sharing (as does ASI, SWBT's own advanced-services affiliate) but by ordering and provisioning stand-alone loops, for which installation problems are inevitably more common.

Moreover, because CLECs have precisely the same access to loop makeup information as ASI, SWBT is complying with its obligations under the UNE Remand and Line Sharing orders to provide nondiscriminatory access to loop qualification information. And, notwithstanding the complaints of IP Communications and WorldCom, any CLEC can provide integrated voice and data service over a single loop, without the need to have SWBT provide all of the necessary equipment and do all the necessary work. The Commission rejected this precise argument in the Texas Order, and it should do so again here.

Various CLECs have raised a number of miscellaneous issues, none of which conceivably justifies withholding approval of this Joint Application:

Although no one disputes that SWBT has satisfied its Track A showing in Oklahoma, Sprint purports to challenge SWBT's Track A showing in Kansas. Yet, by its own admission, Sprint is serving residential customers predominantly over its own facilities, while available evidence indicates that at least two other carriers are providing service to business and residential customers using their own switches, UNE-P, and resale. This clearly satisfies the requirements of Track A.

A few commenters have challenged the sufficiency of SWBT's performance remedy plans. But these plans not only build on the plan that this Commission approved in Texas, they actually provide SWBT with additional incentives to ensure that there will be no backsliding after this Joint Application is granted.

AT&T has raised a number of fact-based interconnection disputes, all of which depend on the specific network architecture that a CLEC might choose to employ for interconnection with SWBT's network. Not only are these complaints entirely inappropriate for resolution in this section 271 proceeding, but each of AT&T's claims is meritless. Moreover, AT&T's criticism of SWBT's offer to allow for a single point of interconnection is nothing but an attempt to reopen an issue that this Commission resolved in the Texas Order. In language that is virtually identical to that which this Commission has already approved, SWBT is providing to CLECs the option to interconnect at a single point within a LATA. The approved language in the Texas Order makes clear that, where a CLEC chooses to interconnect in such a way that requires additional transport to and from another local exchange, it is the CLEC that pays for this technically feasible, and relatively expensive, form of interconnection.

Notwithstanding complaints to the contrary, SWBT's procedures for converting special access circuits to UNEs fully comply with the Commission's requirements in the UNE Remand

Supplemental Clarification Order. Moreover, some CLECs have rehashed the same old complaints about the need for SWBT generally to unbundle its Project Pronto facilities, an argument that this Commission correctly rejected in the UNE Remand Order.

One CLEC has complained about discriminatory treatment in the provision of white pages listings in Illinois and Wisconsin, which are simply irrelevant to whether SWBT has satisfied this checklist item in Kansas and Oklahoma. Sprint's complaints about number portability are belied by SWBT's generally excellent performance as reflected in the relevant measurements. WorldCom and e.spire have complained about the fact that SWBT has refused to pay reciprocal compensation for Internet-bound calls in Oklahoma. Yet, not only has SWBT complied with every state commission order concerning ISP-bound traffic, but also this Commission has consistently held that it will not use section 271 proceedings to address disputes over compensation for Internet-bound calls. Finally, CLEC complaints about the absence of a "fresh look" requirement are unavailing; this Commission has refrained from imposing such a requirement as a condition for section 271 relief, and it should continue to do so.

* * * * *

None of the comments has called into question the wisdom of granting this Joint Application. The time has come to extend the same benefits of competition to the citizens of Kansas and Oklahoma that the citizens of New York and Texas have already begun to enjoy. Southwestern Bell has demonstrated in this record that there are competing providers in both Kansas and Oklahoma that are offering service to residential and business subscribers predominantly over their own facilities pursuant to binding agreements that fully implement the fourteen-point competitive checklist. Moreover, Southwestern Bell has demonstrated not only that it will provide its long-distance service through a separate affiliate in accordance with

section 272, but also that Southwestern Bell's provision of such services is in the public interest, convenience, and necessity. Having therefore satisfied the requirements of section 271 in both Kansas and Oklahoma, Southwestern Bell respectfully requests that this Commission grant the Joint Application.

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Tab 5:	William C. Deere (Environmental Management, Inc.'s Motion to Dismiss)
Tab 6:	William R. Dysart (Performance Monitoring)
Tab 7:	Elizabeth A. Ham (Access to Electronic OSS)
Tab 8:	James L. Jones (Oklahoma State Proceedings)

- Tab 9: Larry K. Mah
(Network Engineering)
- Tab 10: Weldon McLaughlin
(Billing)
- Tab 11: Brian D. Noland
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- Tab 12: Thomas G. Ries and Barbara A. Smith
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(Local Operations Center)
- Tab 15: J. Gary Smith
(Local Competition and Track A Compliance)
- Tab 16: Rebecca L. Sparks
(Interconnection; Access to Network Elements; Reciprocal Compensation
for the Exchange of Local Traffic; Resale)
- Tab 17: Mark J. Welch
(Loop Makeup Information)

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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CC Docket No. 00-217

To: The Commission

**REPLY BRIEF OF SOUTHWESTERN BELL
IN SUPPORT OF INTERLATA RELIEF IN KANSAS AND OKLAHOMA**

INTRODUCTION

The overwhelming majority of comments filed in this docket support Southwestern Bell's Joint Application for interLATA relief in Kansas and Oklahoma. The views of the Communications Workers of America ("CWA") are typical: Southwestern Bell's entry "will increase competition in the long distance market, particularly for residential consumers at a time when AT&T, WorldCom, and Sprint have indicated their intentions to retreat considerably from the residential consumer market."¹ But these comments are not limited to touting the undeniable

¹ CWA Comments at 1; see also Stratton Taylor, President Pro Tempore, Oklahoma State Senate, Comments at 1 ("[I]t is up to the FCC to allow Oklahomans to share the benefits already extended to our neighbors in Texas. . . . Southwestern Bell's entry in Texas triggered not only much lower rates, but some very aggressive marketing by long distance competitors. In that scenario, all consumers benefit."); Chad Smith, Principal Chief, Cherokee Nation Comments at 1 ("Oklahoma consumers can expect Southwestern Bell to offer long distance packages similar to what the company currently offers in Texas."); Governor Frank Keating Comments at 1 ("I urge you to give states like Oklahoma the tools we need to continue to grow our local economies and to sustain the rural qualities of life. And, in doing so, I urge you to support Southwestern Bell's application to provide long distance service to all Oklahomans who want it."); League of United Latin American Citizens Comments at 1 ("[I]t is obvious that the lower long distance rates that

benefits that Southwestern Bell's entry would bring to long-distance customers: "Southwestern Bell has a proven record of providing quality local service. Southwestern Bell should have the opportunity to provide long distance service in this market."²

Moreover, both OCC and the KCC have endorsed this Joint Application in their respective states. "The OCC believes that the entry of Southwestern Bell into the long distance market will benefit not only long distance markets within Oklahoma, but will also encourage competition in the local exchange market in Oklahoma. The OCC believes that the end-users in Oklahoma will receive the ultimate benefit of Southwestern Bell and other carriers entering the market." OCC Recommendation at 2. And both the OCC and the KCC have systematically verified that Southwestern Bell has satisfied each of the requirements of the competitive checklist. See OCC Final Order at 158-91; KCC Report at 7-35.

In the face of these comments supporting Southwestern Bell's Application, the Big Three long-distance companies – AT&T, WorldCom, Sprint – and a small assortment of CLECs have expressed their opposition. Some of these commenters never even bothered to participate in the state proceedings, choosing to raise issues for the first time before this Commission. Others simply reiterate arguments that have been exhaustively considered and rejected by the state commissions or by this Commission in prior orders. Still others have used this proceeding to

Southwestern Bell's entrance into the Kansas and Oklahoma market will bring will be a big benefit for Hispanic consumers."); Gary Knoll Comments at 1 ("Southwestern Bell Kansas has an excellent reputation in Western Kansas for providing both quality service and products. This type of reputation would carry over into the long distance market that is now served by a few Companies that have controlled the market for a long time.").

² Urban League of Greater Oklahoma City Comments at 1; see also American Family Insurance Co. Comments at 1 ("Southwestern Bell has met the customers needs in the local phone market. I believe they will do the same in the long distance market.")

complain about specific operational issues that are appropriately addressed through mechanisms in place in each state to resolve such disputes.

The commenters have focused their attention on three principal issues: First, whether the prices for unbundled network elements are truly cost based; second, whether Southwestern Bell has demonstrated that the operational support systems ("OSS") that CLECs have used successfully to pre-order, order, provision, maintain and repair, and bill services in Texas are the same systems available to CLECs in Kansas and Oklahoma; and, finally, whether Southwestern Bell's performance in the provisioning of unbundled loops has been adequate. Southwestern Bell will address each of these issues in turn, and then address a variety of miscellaneous matters that the commenters have raised.

DISCUSSION

I. PRICING OF UNBUNDLED NETWORK ELEMENTS

As SWBT demonstrated in its Joint Application, SWBT's rates for unbundled network elements ("UNEs") in both Oklahoma and Kansas are in accord with the TELRIC methodology as previously articulated by this Commission. See Southwestern Bell Br. at 42. Accordingly, SWBT provides CLECs even lower rates than they would be eligible to receive under the Telecommunications Act of 1996 ("1996 Act") as recently interpreted by the Eighth Circuit. See Iowa Utils. Bd. v. FCC, 219 F.3d 744, 749-51 (8th Cir. 2000) ("Iowa Utils. Bd. II").

A. The Commission Does Not And Should Not Review State Prices De Novo in Section 271 Proceedings

Several commenters and the Department of Justice ("DOJ") nevertheless take issue with SWBT's prices in Oklahoma and Kansas. DOJ and AT&T, for example, ask the Commission independently to review the UNE rates to ensure that they comply with TELRIC. See, e.g., AT&T Comments at 2; DOJ Evaluation at 2. The Commission has made clear, however, that it

does not review rates de novo in a section 271 proceeding. As the D.C. Circuit noted in affirming the Commission's order approving Bell Atlantic's 271 application in New York, "[t]he FCC does not conduct de novo review of state pricing determinations in section 271 proceedings, nor does it adjust rates to conform with TELRIC." AT&T Corp. v. FCC, 220 F.3d 607, 615 (D.C. Cir. 2000); see also Memorandum Opinion and Order, Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, 15 FCC Rcd 3953, 4084, ¶ 244 (1999) ("New York Order"). Rather, the Commission's role is to determine only whether the state's rates comply with basic TELRIC principles:

In reviewing state pricing decisions in the context of section 271 applications, we will not reject an application because isolated factual findings by a commission might be different from what we might have found if we were arbitrating the matter under section 252(e)(5). Rather, we will reject the application only if basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce.

New York Order, 15 FCC Rcd at 4084, ¶ 244.

None of the commenters has made even a hint of a showing that the Oklahoma or Kansas Commissions made "clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce." And none of the commenters, including DOJ, has provided a basis for the Commission to change its standard of review. See, e.g., DOJ Evaluation at 11 (recognizing that the standard is whether "'basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range of reasonable application of TELRIC'" (quoting New York Order, 15 FCC Rcd at 4084, ¶ 244)).

Instead, the commenters and DOJ merely argue that, because some of the rates in Oklahoma and Kansas are somewhat higher than the rates in Texas, the rates in Oklahoma and Kansas must not be cost based. See, e.g., DOJ Evaluation at 14-16; Sprint Comments at 27-44; ConnectSouth Communications Comments at 3-4; IP Communications Comments at 5-10. DOJ goes even further and suggests that, as a general matter, “the Commission should compare the prices established in a state with prices established in other states for the same unbundled element, especially with prices that have been previously examined by the Commission and found to be appropriately cost based.” DOJ Evaluation at 12.

That argument clashes with this Commission's precedents and is wrong as a matter of economics and law. DOJ's argument essentially elevates the states in which 271 relief has been granted – as of now, New York and Texas – to national benchmarks. But, as the D.C. Circuit explained, “TELRIC is not a specific formula, but a framework of principles that govern pricing determinations.” AT&T Corp. v. FCC, 220 F.3d at 615. “[W]hile TELRIC consists of ‘methodological principles’ for setting prices, states retain flexibility to consider ‘local technological, environmental, regulatory, and economic conditions.’” New York Order, 15 FCC Rcd at 4084, ¶ 244 (quoting Local Competition Order,³ 11 FCC Rcd at 15559, ¶ 114). Asking the Commission to conduct state-to-state comparisons ignores the fact that, as this Commission has recognized, rates will “vary[] . . . from state to state.” Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of

³ First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11-FCC Rcd 15499 (“Local Competition Order”), modified on recon., 11 FCC Rcd 13042 (1996), vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999), decision on remand, Iowa Utils. Bd. v. FCC, 219 F.3d 744 (8th Cir.), petitions for cert. pending, Nos. 00-511, 00-555, 00-587, 00-590, & 00-602 (U.S. 2000).

1934, as amended, To Provide In-Region, InterLATA Services In Michigan, 12 FCC Rcd 20543, 30699, ¶ 291 (1997) (“Michigan Order”). “[W]hile state commissions use TELRIC to establish rates, application of TELRIC principles may result in different rates in different states.” AT&T Corp. v. FCC, 220 F.3d at 615.

Accordingly, the commenters that would set Texas as a benchmark ignore the fact that TELRIC is a methodology, not a result. The variation among the rates in Kansas, Oklahoma, and Texas is not only reasonable, but it is to be expected under the pricing regime enacted by Congress in the 1996 Act and by the Commission's pricing methodology. The Commission itself recognized variation from state-to-state in its Local Competition Order when it established default proxies for particular network elements. With respect to unbundled local loops, for example, the Commission established proxies, based on a forward-looking cost model “reasonably close” to TELRIC. 11 FCC Rcd at 15894, ¶ 792. Under that methodology, the Commission established a rate of \$15.49 for Texas; \$19.85 for Kansas; and \$17.63 for Oklahoma. 47 C.F.R. § 51.513(c)(1), Table; see also Ries/B. Smith Joint Reply Aff. ¶ 49. In other words, the Commission recognized that costs were higher for Oklahoma and Kansas compared to Texas when it established proxy rates for loops, since the rates were 14 percent higher for Oklahoma and 28 percent higher for Kansas compared to the proxy established for Texas.

These commenters' position should also be rejected for an additional reason. Conducting a state-to-state comparison would unnecessarily complicate the Commission's review and fail to give the appropriate deference to state commission decisions. State commissions are not required to set their rates with an eye toward the rates in other states. Neither the OCC nor the KCC was obligated to begin its ratemaking with the Texas prices as a benchmark. There is,

therefore, no legal basis for this Commission to start from that presumption. Indeed, such a presumption would conflict with the limitations on the Commission's authority, as the Supreme Court and the Eighth Circuit recently held. As these courts have made plain, the Commission has no authority – nor has it ever claimed to have such authority – to set rates on its own, as AT&T and DOJ suggest:⁴

[T]he FCC “has jurisdiction to design a pricing methodology.” [525 U.S. at 285]. However, the FCC does not have jurisdiction to set the actual prices for the state commissions to use. Setting specific prices goes beyond the FCC's authority to design a pricing methodology and intrudes on the states' right to set the actual rates pursuant to § 252(c)(2). Following the Supreme Court's opinion, we now agree with the FCC that its role is to resolve “general methodological issues,” and it is the state commission's role to exercise its discretion in establishing rates.

Iowa Utils. Bd. II, 219 F3d at 757 (citation omitted; quoting from Commission's Supreme Court Brief). Thus, the Commission's role in this proceeding is to review the KCC's and OCC's “general methodologies,” not to pass judgment on or second guess the rates approved for use by the state commissions.

B. The Variations Among States Are Explained by Differences in Costs

A closer look at the variations among the Oklahoma, Kansas, and Texas rates demonstrates that it is explained by state-based differences in inputs, not methodologies. As noted above, the FCC's own proxy rates for loops were 14 percent and 28 percent higher, respectively, for Oklahoma and Kansas compared to the rates set for Texas. In fact, the models filed by SWBT in Kansas, Oklahoma, and Texas were the same models. Ries/B. Smith Joint Reply Aff. ¶¶ 7, 33, 48. Once the models were established, each state commission then conducted proceedings to determine the inputs for each of the various models. Id. These different inputs – which stem from cost differences in each state – explain the variation in rates.

⁴ See AT&T Comments at 34-40; DOJ Evaluation at 2.

The differences in recurring loop rates, for instance, stem from differences in cost drivers, such as loop lengths, cost of cable placement, and fill factors. See Ries/B. Smith Joint Reply Aff. ¶¶ 35-41. These differences are due, in large part, to the different geographic zones in the three states, customer distances from wirecenters, mixes of cable, and fill factors. Id. ¶¶ 36-39. As Charles Cleek explains in his reply affidavit, there is an enormous difference between the alignment of urban, suburban, and rural zones in Texas and Kansas. For instance, a CLEC operating in an “urban” zone in Kansas (such as Garden City, Salina, or Hutchinson) pays a loop rate that is considerably lower than the rate paid in comparably sized exchanges in Texas. Cleek Reply Aff. ¶ 18. Thus, the Texas loop rates are actually higher than the Kansas loop rates for comparably sized exchanges. The total monthly cost for the UNE platform is also higher for a CLEC in Texas than for a CLEC operating in comparably sized exchanges in Kansas. Id. ¶¶ 19-20.

Similarly, the Oklahoma urban zone is equivalent to the Texas suburban zone, and the Oklahoma suburban zone is similar to the Texas rural zone. Jones Reply Aff. ¶¶ 35-36. Oklahoma has no exchange that would fall into the Texas urban-zone parameters. Id. ¶ 36. When comparably sized exchanges in Oklahoma and Texas are compared, the rates are quite similar. For instance, the price for two-wire analog loops in the urban zone in Oklahoma is below the comparably sized suburban-zone price in Texas. Id. ¶ 37. The price for the two-wire analog loop in the suburban zone in Oklahoma is below the comparably sized rural-zone price in Texas. Id. Likewise, the analog switch port prices in Oklahoma are lower than the switch port prices in comparable Texas zones. Id. Moreover, the total monthly cost for the UNE platform is virtually the same in Oklahoma as it is in comparably sized exchanges in Texas. Id. ¶ 43.

These differences in zone definition resulted in loop populations with varying loop lengths, cable costs, and other cost driver values. It is no surprise, therefore, that loop costs are greater in Kansas than in Oklahoma and Texas, especially in the rural zone. Ries/B. Smith Joint Reply Aff. ¶ 37. The average loop length in Kansas is 78 percent greater than the average loop length in Texas. Id. Attach. B, Chart 1. The cable costs per pair foot are higher in Kansas and Oklahoma than in Texas. Id. In fact, Texas has the shortest distribution cable length and the lowest cable cost per pair foot among the three, which in part explains its lower loop costs. In Kansas and Texas, moreover, the state commissions modified SWBT's loop costs during the review process. Id. ¶ 40. These changes substantially lowered the original loop costs. See id. Attach. B, Chart 2. For instance, in Kansas, the KCC adjusted SWBT's definitions of distance bands so that the average loop lengths were reduced. Id. ¶ 41. The KCC also increased distribution cable fill factors, and lengthened service lives. Id. As a result of these adjustments, loop costs were decreased by approximately two-thirds in Kansas. The Texas Public Utility Commission ("Texas Commission") also made adjustments in its Mega Arbitration proceeding. Id. ¶ 42. The adjustments substantially altered the original TELRIC values presented by SWBT in Kansas and Texas. Id. ¶ 43. The OCC did not make such adjustments. Id. ¶ 42. Thus, after the Kansas and Texas commissions made their adjustments, the TELRIC values for the two-wire, analog loops were no longer comparable among the three states, and a comparison of the three to gauge TELRIC-compliance is meaningless.

The three states also differ in terms of the costs of non-recurring elements. As with recurring charges, the states made adjustments to the inputs. Id. ¶ 46. For example, Kansas and Texas each ordered downward adjustments to labor rates. Id. Kansas also adjusted the fallout

rate that applied to manual processes. Id. The Texas and Kansas commissions made further downward adjustments that were not explained. Id.

Moreover, the non-recurring loop rates developed for Texas do not include installation and maintenance activities, which were intended to be recovered via the Central Office Access Charge ("COAC") and the Trip charge. While SWBT proposed a \$15.03 non-recurring rate for the loop, a \$16.35 rate for the COAC, and a \$14.60 rate for the Trip charge, id. ¶ 45, for a total of \$45.98, the Texas Commission ordered merely the \$15.03 rate for the loop. In Oklahoma, in contrast, there was no existing retail tariff structure to apply the COAC and Trip charge separately, so the non-recurring cost study for the loop was developed to include these charges. See Jones Reply Aff. ¶ 39. The ordered rate of \$37.50 therefore includes these charges. Because Kansas also lacked a retail tariff to apply the COAC and Trip charges, the non-recurring price of \$30.75 includes these charges as well. In addition, if the non-recurring rates are amortized over a two-year period (which is the minimum period of time over which a CLEC would likely attempt to recover its acquisition costs) and added to the recurring charges, the total monthly cost for the UNE-P is lower in Oklahoma and Kansas than it is in comparably sized exchanges in Texas. See Jones Reply Aff. ¶¶ 42-43; Cleek Reply Aff. ¶¶ 19-20.

Thus, the differences across these states in terms of final prices are not the result of varying commitments to TELRIC. Rather, all three states used a TELRIC standard and employed the same model. The states differ, however, in terms of the inputs to that model. The states also reached different conclusions regarding how much they wanted to anticipate future cost reductions. Ries/B. Smith Joint Reply Aff. ¶ 48. All of these commissions based their prices on forward-looking estimates; they reached different conclusions because they made different estimates.

Not only are the differences among the states readily explainable and defensible, but, more importantly, the record is clear that both the KCC and the OCC established TELRIC-based rates. See Ries/B. Smith Joint Reply Aff. ¶¶ 8, 33-34. As discussed in greater detail below, each commission oversaw a process that was legitimately designed to set rates according to basic TELRIC principles.

C. The KCC Adhered to TELRIC in Establishing Its Rates

The KCC has repeatedly and consistently stated its commitment to adopt “inputs consistent with the TELRIC . . . methodology.”⁵ It has adopted a “pricing methodology based on forward-looking, economic costs” and has rejected embedded costs. See Final KCC Order Establishing SWBT's Prices ¶ 69.

Shortly after the Commission issued its Local Competition Order, SWBT submitted TELRIC studies to the KCC as part of an arbitration with Sprint. See Ries KS Aff. ¶ 9; Cleek Reply Aff. ¶ 5. Sprint asked the KCC to establish a generic proceeding to examine SWBT's costs; AT&T joined its request, and the KCC established the generic proceeding in November 1996. See Cleek Reply Aff. ¶¶ 5-6. More than 20 different parties participated in the cost docket, id. ¶ 5, and SWBT and others filed forward-looking models to determine TELRIC-based costs, Ries KS Aff. ¶ 10; Cleek Reply Aff. ¶ 7. As Thomas Ries and Barbara Smith describe in detail in their joint reply affidavit, these studies complied in all respects with TELRIC. See Ries/B. Smith Joint Reply Aff. ¶¶ 5-32. In fact, these were the same models that were submitted and approved in Texas. Id. ¶¶ 7-8.

⁵ Final Order Establishing SWBT's Prices for Interconnection and UNEs, Application of Sprint Communications Co. et al, for the Commission to Open a Generic Proceeding on Southwestern Bell Telephone Company's Rates for Interconnection, Unbundled Elements, Transport and Termination, and Resale, Docket No. 97-SCCC-149-GIT, ¶ 69 (KCC Feb. 19, 1999) (“Final KCC Order Establishing SWBT's Prices”) (citing 1998 order) (App. G, Tab 22).

The KCC held hearings and adopted SWBT's models for purposes of UNE cost development and determining prices. Ries KS Aff. ¶ 9; Cleek Reply Aff. ¶ 7. Thus, the KCC selected the same models the Texas Commission chose, and those models fully embody this Commission's pricing rules and principles. Ries/B. Smith Joint Reply Aff. ¶ 8. The KCC then initiated proceedings to determine the appropriate inputs. Ries KS Aff. ¶ 11. The KCC prescribed inputs to be used in SWBT's cost studies on November 16, 1998, and directed SWBT to rerun its recurring cost studies. Cleek Reply Aff. ¶ 8. During the four years that the Kansas docket has been open, the KCC has conducted discovery; held technical workshops; reviewed hundreds of pages of cost studies, pre-filed testimony, comments, briefs and petitions for reconsideration; and held hearings with witnesses subject to cross-examination. See id. ¶ 5. The KCC Staff and Commissioners also hired independent experts to review SWBT's cost studies. Id.

The prices ultimately approved by the KCC were based on TELRIC models. See KCC Report at 21. It "evaluate[d] the costs and determine[d] the prices for UNEs and interconnection on a forward-looking, nondiscriminatory basis that includes a reasonable profit." Final KCC Order Establishing SWBT's Prices ¶ 71. It adopted "prices within the range of participants' proposals" and concluded that the prices it adopted "are based on the TELRIC cost of UNEs and interconnection and are just and reasonable." Id. ¶ 72.

As DOJ admits, no commenter has challenged the cost-based nature of Kansas's recurring rates. DOJ Evaluation at 27 n.89. Indeed, even AT&T concedes that the KCC adopted recurring charges in compliance with the 1996 Act. See AT&T Comments at 18. In fact, SWBT is the only party that has filed an appeal of the KCC's orders in the cost docket, and that was

merely to preserve SWBT's rights under the Eighth Circuit's recent opinion.⁶ See Cleek Reply Aff. ¶ 14. Until SWBT's Joint Application was filed with this Commission, no party complained that the KCC had somehow failed to carry out its responsibilities to comply with the TELRIC methodology.

And while AT&T and the DOJ now claim that the KCC's process for determining non-recurring rates was flawed, the KCC established the non-recurring rates based upon submitted cost studies that applied the same TELRIC methodology as the cost studies that were the basis for the recurring rates set by the KCC – rates that neither the DOJ nor AT&T contest. See Cleek Reply Aff. ¶ 4; Ries KS Aff. ¶ 29; Ries/B. Smith Joint Reply Aff. ¶¶ 65-70. The KCC established the same general parameters for recurring and non-recurring cost elements in the same order, its Final KCC Order Establishing SWBT's Prices. See Order Regarding Non-Recurring Charges for Unbundled Network Elements, Application of Sprint Communications Co. et al. for the Commission to Open a Generic Proceeding on Southwestern Bell Telephone Company's Rates for Interconnection, Unbundled Elements, Transport and Termination, and Resale, Docket No. 97-SCCC-149-GIT, ¶ 1 (KCC Nov. 3, 2000) ("Order Regarding Non-Recurring Charges"), Att. 12 to KCC Report. In that order, the KCC required parties to file non-recurring cost studies applying "a forward-looking cost methodology, known as Total Element Long Run Incremental Costs ("TELRIC")." Id. ¶ 2. The KCC thus recognized its "obligat[ion] to follow the FCC methodology for pricing unbundled network elements because the FCC has chosen to exercise its statutory authority to prescribe a cost methodology for state commissions."

⁶ SWBT and the KCC have now reached a settlement of these issues, and the KCC has agreed to open a docket to review prices if the Commission's pricing rules are ultimately modified. Cleek Reply Aff. ¶ 14.

Id. There is not a shred of evidence that the KCC abandoned that acknowledged obligation at any point in the non-recurring cost proceedings.

In September 1999, the KCC ordered SWBT to re-run and file its non-recurring cost studies and apply TELRIC. Id. ¶ 2. See also Cleek Reply Aff. ¶ 9. On November 9, 1999, SWBT submitted its re-run of the non-recurring cost studies, and parties filed comments and reply comments. Id. AT&T mistakenly suggests that "SWBT ignored the KCC's order" and refiled cost studies with the "same errors, including, for many NRCs, the same erroneous 100 percent manual processing assumption." Baranowski and Flappan Aff. ¶ 21. As Thomas Ries and Barbara Smith explain in their joint reply affidavit, SWBT's non-recurring studies in Kansas were not based on a 100 percent manual processing assumption as AT&T suggests. Ries/B. Smith Joint Reply Aff. ¶¶ 65-66. On the contrary, the studies used mechanized processing and complied with TELRIC. Id. ¶ 65. Moreover, the KCC's order was susceptible to more than one reasonable interpretation, as the KCC Staff noted in its comments, id. ¶ 66 (citing Staff Comments at 13 (filed Dec. 17, 1999)), and SWBT's interpretation of the order was entirely reasonable. Id. In any event, the KCC did not reject SWBT's non-recurring studies as non-compliant with the TELRIC methodology, but noted that they were simply not in "perfect compliance" with its input requirements and listed the handful of inputs that it wanted adjusted. Order Regarding Non-Recurring Charges ¶ 13.

The KCC therefore adjusted the inputs in setting the final prices for non-recurring costs. And it did so in compliance with TELRIC. For instance, the KCC refused to permit an assumption of high fallout rates in the non-recurring cost studies because it would be inconsistent "with TELRIC principles requiring forward-looking, least cost methods." Id. ¶ 35. The KCC considered all of this evidence, rejecting some aspects of SWBT's and AT&T's studies and

accepting others. Id. In all instances, however, the KCC applied TELRIC pricing principles. As the KCC held, its prices for non-recurring elements “fall inside the range of prices that a reasonable application of TELRIC principles would produce.” Id. ¶ 58.

The DOJ criticizes the KCC for adopting a “‘settlement’ type approach” for some non-recurring rates, see DOJ Evaluation at 26, but the KCC’s weighted average of different TELRIC-based cost proposals is a long-accepted method of establishing rates by state commissions throughout the country. This Commission has made similar determinations in setting cost-based pricing. In a recent payphone proceeding, for instance, the Commission concluded that the costs for a payphone unit (e.g., enclosure, pedestal, installation, and the associated parts) could be determined based on the median of cost figures submitted by two different parties.⁷ The Texas Commission, moreover, used the same methodology in setting the recurring and non-recurring rates in Texas, and the Commission fully endorsed the Texas Commission’s methodology. See Sparks Reply Aff. ¶¶ 34-35.

Although the DOJ repeats its objection that the non-recurring rates in Kansas are not cost based because they are higher than Texas, as explained earlier, state-based variations are to be expected under the 1996 Act that was enacted by Congress. In any event, as Charles Cleek explains in his reply affidavit, the non-recurring rates should be compared, if at all, on an amortized basis. That is, the non-recurring rates should not be compared directly but amortized over the period of time during which the CLEC will likely have a business relationship with an end-user – such as a two-year period. When the non-recurring charges are added to the recurring

⁷ See Third Report and Order, and Order on Reconsideration of the Second Report and Order, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunication Act of 1996, 14 FCC Rcd 2545, 2622-23, ¶ 169 & n.359 (1999).

charges over that two-year period, the costs of operating in Kansas are actually less than those in Texas. Cleek Reply Aff. ¶ 19.

There is, therefore, no basis for AT&T's and the DOJ's suggestion that the non-recurring rates in Kansas do not comply with TELRIC. The non-recurring rates were based on cost studies that followed the same methodology as the recurring rates, and AT&T concedes that the recurring rates are cost based. This Commission's task is to address general methodological issues; state commissions alone have the difficult, and often thankless, responsibility of establishing thousands of rates for use in their states. If AT&T wants to dispute particular prices, the appropriate place to do so is before the KCC. Indeed, AT&T effectively concedes that this dispute belongs in the KCC, for it has filed a petition for reconsideration of the non-recurring rates set by the KCC. See id. ¶¶ 4, 12.⁸ Because the KCC has repeatedly demonstrated its commitment to TELRIC and has complied with the TELRIC methodology in setting both its recurring and non-recurring rates, there is simply no basis for the Commission, as part of its section 271 review, to reject the KCC's pricing determinations.

D. The OCC Complied with TELRIC in Establishing Its Rates

The OCC has adopted rules requiring incumbent LECs to provide long-run incremental cost studies during arbitration proceedings. See Jones Aff. ¶ 35. To effectuate that rule, the OCC established two separate dockets to establish permanent rates for UNEs. In these dockets, SWBT provided "forward-looking economic cost studies using forward-looking long run incremental costs (LRIC) for the UNEs presented." Amended Report and Recommendation of the Administrative Law Judge at 3, Cause Nos. PUD 970000213 & PUD 970000442 (OCC June

⁸ Birch also filed a petition for reconsideration but did not challenge the actual prices set by the KCC. Cleek Reply Aff. ¶ 12.

30, 1998) ("1998 Oklahoma ALJ Report").⁹ As Thomas Ries and Barbara Smith explain in detail in their joint reply affidavit, SWBT's cost studies complied in all respects with this Commission's TELRIC methodology. See Ries/B. Smith Joint Reply Aff. ¶¶ 5-50. They were not based on embedded costs, as Robert Flappan suggests. Id. ¶¶ 20, 53. Rather, the studies reflected a forward-looking network, with technology inputs modified to reflect the most efficient choice. Id. The fill factors were based on this Commission's guidelines and an examination of trends in fill factors in loops and transports. Id. ¶ 53. And common costs reflected not historical relationships, but forward-looking cost levels. Id. ¶¶ 62-63.

The rates that SWBT proposed to the OCC were based on those TELRIC studies. See Ries OK Aff. ¶ 8; 1998 Oklahoma ALJ Report at 51-52. The OCC then evaluated SWBT's proposed costs and prices, as well as cost and price submissions by AT&T, Cox, and the OCC Staff. See Ries OK Aff. ¶ 8; 1998 Oklahoma ALJ Report at 51-55. In the end, all of the parties to the pricing dockets, including AT&T, stipulated to SWBT's cost methodology and agreed to challenge only the "inputs" (i.e., the underlying cost numbers) utilized in SWBT's cost studies. Jones Reply Aff. ¶ 6. In other words, the parties all agreed not to dispute the cost methodology itself, presumably because there was no basis to challenge the correctness of that methodology under this Commission's rules. And AT&T never objected to SWBT's rates in the Oklahoma 271 proceeding. See Jones Reply Aff. ¶ 32. Given that this Commission "will look to the state to resolve factual disputes wherever possible,"¹⁰ AT&T's failure to raise any of these pricing

⁹ The 1998 Oklahoma ALJ Report was attached to the Ex Parte Letter from G. Klineberg to Magalie Roman Salas (FCC filed Nov. 29, 2000).

¹⁰ Memorandum Opinion and Order, Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas, CC Docket No. 00-65, FCC 00-238, ¶ 51 (rel. June 30, 2000) ("Texas Order").

questions to the OCC is simply inexcusable. In any case, AT&T's objections to the pricing in Oklahoma are meritless.

After a 15-month investigation, in which it thoroughly reviewed all of the submitted cost studies and held a full evidentiary hearing in these dockets, the OCC established prices for UNEs.¹¹ Jones Aff. ¶¶ 35-37; Jones Reply Aff. ¶ 7. The OCC relied on the ALJ's 167-page report, which approved a rate stipulation agreed to by Cox and the OCC Staff. The ALJ concluded that "the stipulated rates are based upon an analysis of the costs presented by the parties to this proceeding and are thus, cost based and clearly supported by the evidence." 1998 Oklahoma ALJ Report at 156.

And, indeed, there was ample evidence in the record that the approved rates were cost based. The rates "were supported by cost evidence introduced by SWBT, Liberty [an independent consulting firm hired by the OCC Staff] and AT&T." *Id.* at 105. Dr. Frances Collins, an expert witness for Cox, testified that "the input data to the cost studies presented by the various parties are subject to speculation, are forward looking and have been developed as a result of estimates of time, cost, inflation rates and other subjective estimates." *Id.* at 107. "SWBT has filed evidence establishing the upper boundary of the range of TELRIC costs and rates for UNEs; while AT&T has filed evidence establishing the lower boundary of the range; Cox has filed evidence supporting TELRIC costs and rates lower than SWBT but higher than AT&T." *Id.* at 110. As Dr. Collins testified, the disparity was not the result of different methodologies but of "the input data utilized." *Id.* at 110-11; see also *id.* at 111 ("The differences between these costs [are] the result of differences of opinions in the input data.").

¹¹ Although the OCC emphasized that these prices would be subject to periodic review and adjustment in accordance with the 1996 Act, Oklahoma law, and OCC policy, the prices established in these dockets are "permanent."

“[T]he rates contained within the Cox/PUD stipulation are within the range of possible outcomes in this docket.” Id. at 111. In sum, Dr. Collins, a CLEC witness, affirmatively testified that the rates in the stipulation are cost based and that Cox could enter the competitive marketplace with the rates proposed in the stipulation. Id. He further testified that “any market entrant could develop a network under the stipulated rates.” Id. at 112.

SWBT also submitted evidence that, had SWBT re-run its loop studies using the cost evidence submitted by Liberty, the results would be “remarkably close to the proposed stipulation.” Id. at 105. A similar result would occur if Liberty’s costs for switching and transport were also used in SWBT’s studies. Id. at 106. The ALJ also noted that had “SWBT’s cost studies been adjusted for reasons suggested by AT&T (e.g., related to fill, depreciation, the cost of money, the common cost allocator, time adjustments, utilization, etc.), then the rates proposed by SWBT would have been reasonably close to the stipulated rates.” Id. at 158. The Oklahoma Staff stated the rates were “fair and reasonable and satisfy the costing standards contained in Section 252 of the federal Telecommunications Act of 1996 and are forward-looking.” Id. at 105.

The DOJ simply ignores this record evidence. It states that it is “not aware of any . . . determination in Oklahoma” that the adopted prices “are appropriately cost based.” DOJ Evaluation at 18. As demonstrated above, that is simply untrue. DOJ further notes that “[t]he fact that a price is set in some mid-point range between prices proposed by an ILEC and a CLEC does not indicate that the price is appropriately cost based, absent a separate determination that both the higher and lower proposed prices are appropriately cost based.” Id. But the ALJ made precisely such a determination; he expressly found that the parties in the proceeding all presented “cost-based” evidence. 1998 Oklahoma ALJ Report at 156. The ALJ went on to hold that the

stipulated rates, which “fall well within the ranges of the various proposals,” were also cost based. Id. at 158-59.

A closer look at the ALJ's specific analysis of three key elements – loops, switching, and transport – shows that the ALJ conducted exactly the type of analysis that the DOJ claims was lacking. The ALJ determined that the higher and lower proposed prices were cost based and approved the stipulated rates as falling within that range. In analyzing the stipulated rates for loops, the ALJ noted that “the range of potential costs amply support the stipulation positioning of rates.” Id. at 162. The ALJ gave “considerable credence” to the testimony of Dr. Collins on behalf of Cox, who testified that many parties “proposed cost-based rates” and that “the stipulation rates for loops were within the range he supported with his own cost adjustments to SWBT results/inputs.” Id. at 161-62. Such judgments based on live testimony are uniquely within the expertise of the state commissions that Congress trusted with setting prices. There is no basis for this Commission to overturn such a fact-based judgment as to appropriate rates.

The ALJ made a similar determination regarding switching. The ALJ noted that “AT&T's proposal is at best the minimum cost for local switching; SWBT's proposal is at the upper limit of cost, and that cost is probably less if other factors are taken into account, such as the few changes SWBT admits should occur, depreciation and cost of money Thus a local switch rate less than SWBT's cost proposal is appropriate.” Id. at 163.

The ALJ's transport analysis followed the same model. The ALJ concluded, based on the evidence, that “AT&T's proposal, at best, is the lowest possible cost and rate, while SWBT's is the opposite extreme.” Id. at 165. The ALJ went on to hold that there was “ample support” for the stipulation rate. Id.

The ALJ properly rejected AT&T's argument that the "stipulation must fail simply because it does not equal any party's proposal on costs or is not strictly determined by mathematical adjustments to any cost proposal." Id. at 159. The ALJ determined that the parties' proposed cost-based rates, as well as the stipulated rates, fell within a range of reasonableness. The Texas Commission used this same process, adjusting inputs and splitting the difference between cost-based proposals by different parties. See Sparks Reply Aff. ¶¶ 35-36. AT&T, itself, recognized that such a rate-setting process was appropriate when it stated that the cost of capital stipulated by AT&T and SWBT satisfies the costing standards in the 1996 Act, even though it was a number that did not equal any party's proposal but rather fell within the numbers proposed by SWBT and Cox. See 1998 Oklahoma ALJ Report at 159. Indeed, this is the norm for rate-setting proceedings, not the exception. Regulatory bodies rarely accept one party's rate recommendation without modification. See Jones Reply Aff. ¶ 11.

Although AT&T now suggests that Cox, as a cable-based CLEC, "would have no incentive to negotiate low rates for elements, such as loops," AT&T Comments at 10, Cox did, in fact, request a lower loop rate than SWBT had originally proposed. See 1998 Oklahoma ALJ Report at 162. Cox's own witness, Dr. Collins, "testified that SWBT's proposed loop costs are substantially overstated, exceeding his own estimates by 42-48%." Id. at 110. Thus, contrary to AT&T's contention, Cox took great pains to ensure the lowest rates for all elements, including loops.

As the ALJ pointed out in its report, Cox had already entered the Oklahoma market and was currently passing orders at the time it was proposing these rates. AT&T, in contrast, "indicated . . . that it would not enter the market in Oklahoma at any time in the near future, if ever." Id. at 156. Moreover, the stipulation was also reached with the OCC Staff, which had

(and has) every incentive to make sure that rates are cost based and sufficient to promote competition.

Finally, the stipulated rates were much closer to the rates proposed by AT&T than to those proposed by SWBT; in some instances, they were lower than AT&T's proposal. The urban loop rate, for example, "is approximately two thirds of the rate AT&T requested." Id. at 105. The rate for access to OSS was the same as a rate AT&T proposed in a settlement offer. Id. Other rates constituted an average of the rates proposed by SWBT and AT&T. Id. Indeed, AT&T's own witness, Steve Turner, testified that the OCC could set "cost-based rates" at a level "which deviated from those proposed by AT&T." Id. at 147. He "agreed that where there are disagreements on inputs between witnesses for Southwestern Bell, Cox and AT&T, then the Commission could resolve those issues and determine a rate which is fair and reasonable," "reiterat[ing] that AT&T's cost numbers were not the only correct cost-based numbers." Id. In fact, many of AT&T's inputs were unsupported or based on embedded costs. Ries/B. Smith Joint Reply Aff. ¶¶ 59-60.

Moreover, AT&T frequently utilized SWBT's inputs. Id. ¶ 59. And although AT&T claims that SWBT's common costs were embedded, SWBT's common costs were developed in a manner that was fully consistent with TELRIC. Id. ¶¶ 62-63. AT&T's contention that recurring costs were developed using manual processes is also factually incorrect. The non-recurring costs were developed based on the processes that would be used in a forward-looking network, and in many cases included mechanized processes. Id. ¶¶ 55-58.

Finally, it must be noted that CLECs have an additional option in Oklahoma that gives them access to rates that are, in fact, lower than the cost-based rates. The OCC approved an industry stipulation on December 10, 1999, which contained an alternative pricing regulation

plan known as the "Alt Reg" or "Oklahoma Plan." Jones Aff. ¶ 38. The Plan was the result of extensive industry meetings, which included AT&T, WorldCom, Sprint, Birch, Logix, Cox, the OCC Staff, SWBT, the Office of the Oklahoma Attorney General, and various other competitive and independent local exchange companies. Jones Reply Aff. ¶¶ 17-18.

The Oklahoma Plan establishes discounts of up to 25 percent off of SWBT's recurring cost-based rates associated with certain UNEs and elements used as part of the UNE-P in zones 1 and 2, and up to 10 percent in zone 3. Jones Aff. ¶ 38; Jones Reply Aff. ¶ 25. These include the UNE-P itself, basic unbundled loops and loop cross connects, UNE ports, and unbundled dedicated transport. These were the elements identified by CLECs to be discounted in order for them to "do business in Oklahoma." Jones Reply Aff. ¶ 24, 28. For example, Birch stated that it would be more likely to enter the Oklahoma market if the industry stipulation was adopted – and it did. Jones Reply Aff. ¶ 24. Fifteen CLECs have added the alternative regulation appendix to their interconnection agreements. Id. ¶ 24. And since the stipulation went into effect, the number of UNE-Ps in Oklahoma has increased from 1,671 as of May 2000 to 9,674 through October 2000, an increase of almost 500 percent over only a six-month period. Id. ¶ 29.

The Plan also discounts the non-recurring charges for many frequently used UNEs as much as 35 percent. Immediately after the alternative regulation plan was established, on May 1, 2000, SWBT issued an Accessible Letter. See App. E-OK, Tab 29 (CLECO00-028). On June 9, 2000, SWBT posted information on placing orders on its website. See id. As the Accessible Letter makes clear, these rates are universally available on request, and CLECs had ample advance notice of their availability. They have been publicly available since June 15, 2000, to both CLECs that have opted into the O2A and CLECs that have not. Moreover, these discounts will remain in effect up to five years for the provisioning of residential services and up to four or

five years for the provisioning of business services (depending on the zone). Id. Thus, these rates are even lower than what section 252(d) requires and they will be available for a substantial length of time.

E. The Federal Act Does Not Guarantee CLECs a Profit

The Commission cannot override these lawful state determinations simply because some CLECs believe that they cannot make a profit using these rates. See generally Lieberman Decl.; AT&T Comments at 17-18. The 1996 Act is clear that the “just and reasonable rates” for interconnection and unbundled network elements shall be “based on the cost . . . of providing the interconnection or network element (whichever is applicable),” 47 U.S.C. § 252(d)(1). Thus, section 252(d)(1) makes plain that rates are based on cost, not based on what a CLEC needs to make a profit. If cost-based rates prove too high for some competitors to enter the market, that does not make the rates unlawful under the statutory provision. Moreover, AT&T’s argument misses entirely the point that CLECs earn profits by obtaining revenue streams from local service customers that go beyond the cost of each UNE or the UNE-P. For example, they obtain revenue streams from local service, access charges, vertical services, long distance service, intrastate charges, and a host of other services.

Similarly, the Commission should reject DOJ’s suggestion to “consider the extent to which CLECs are purchasing unbundled elements at the established prices.” DOJ Evaluation at 12. The DOJ itself concedes that this would “not necessarily indicate whether prices are or are not cost-based, because the level of demand may reflect factors other than price.” Id. Yet DOJ would have the Commission use this factor as a red flag to signal an “independent scrutiny” of prices. Id. at 12-13. The Commission, however, has already established the standard by which it reviews pricing decisions, and that standard applies to all state commissions, not merely to those

in states where CLEC business plans have targeted UNE entry. And the Commission has rejected the notion a BOC must show that CLECs have attained a certain size or geographic scope or market share. See Memorandum Opinion and Order, Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan, 12 FCC Rcd 20543, 20584-85, ¶¶ 75-77 (1997). Indeed, to base independent scrutiny of prices on how many CLECs have purchased certain UNEs or certain combinations of UNEs would hold state commissions hostage to the particular business plans of CLECs. The Commission's role is to determine whether the state commission has disregarded the TELRIC methodology. Indeed, the whole point of the competitive checklist and the inquiry under section 271(c)(1) in a particular state is to provide a uniform standard by which all states will be judged, not to guarantee profits for CLECs.

F. The Interim Rates in Kansas and Oklahoma Are Appropriate

Finally, the fact that some UNEs and collocation rates are interim does not provide a basis for denying SWBT's Joint Application. See DOJ Evaluation at 13.¹² "[T]he mere presence of interim rates will not generally threaten a section 271 application so long as an interim solution to a particular rate dispute is reasonable under the circumstances, the state commission has demonstrated its commitment to our pricing rules, and provision is made for refunds or true-ups once permanent rates are set." Texas Order ¶ 88. All of these standards are satisfied in Kansas and Oklahoma.

Kansas. The only rates that are interim in Kansas are physical and virtual collocation rates, and rates for various items related to xDSL service (including, among others, the high

¹² Although the Department suggests that interim rates pose a problem "where . . . the permanent rates are of concern," DOJ Evaluation at 13, 24-25, 27-28, the permanent rates in Kansas and Oklahoma comply with TELRIC.

frequency portion of the loop, loop conditioning, and loop qualification). Cleek Reply Aff. ¶ 22. The interim rates for these particular xDSL-related rate elements are all set at zero, subject to true-up. Id. The KCC set interim collocation rates based on SWBT's TELRIC-based cost studies, with a modification by the KCC that significantly reduced rates for power. Id. ¶ 24. The interim collocation rates are also subject to true-up. Id. ¶ 22. Given the KCC's commitment to TELRIC, there is no basis for denying SWBT's application because of the presence of this limited number of interim rates. See Texas Order ¶ 88.

Although Sprint argues that it is harmed by the zero rate for xDSL-service items, Sprint Comments at 32, the Commission rejected these same arguments in the Texas Order. The Commission noted that parties are "poorly positioned to complain about" an interim charge of zero. Texas Order ¶ 237. As the Commission noted, "carriers face uncertainty about the imposition of a true-up only to the extent that they reasonably believe that they may in fact have a legal obligation to pay something greater than a charge of zero. No carrier is immune from the effect of future resolutions of disputed issues." Id. The KCC, moreover, has scheduled proceedings to set permanent rates for the various elements related to the provisioning of xDSL-type services, and the docket is expected to be concluded by mid-2001. Cleek Reply Aff. ¶ 25. SWBT will file TELRIC-based studies in that docket, and there is no doubt that whatever rates are ultimately approved by the KCC, they will be based on the TELRIC methodology. Id.

Sprint's claims that the KCC has "waited years" to set cost-based collocation rates, Sprint Comments at 34 (emphasis in original), ignore the fact that the delay has been the result of CLEC requests (including requests by Sprint) to postpone the proceedings. The CLECs asked the KCC to suspend the collocation tariff that SWBT filed on February 7, 2000, in order to allow them more time to review SWBT's cost studies. Cleek Reply Aff. ¶ 23. After the KCC granted

that request, the CLECs asked the KCC to integrate Texas rates into the Kansas tariff, make the tariff effective immediately, and again delay the cost portion of the docket. Id. The KCC granted the request in part, making the tariff effective immediately, but with Kansas-specific, not Texas, rates. Id. The KCC set a procedural schedule for the cost portion of the proceeding, with hearings to begin in August 2000. Virtually all parties, including Sprint, AT&T, the KCC Staff, and SWBT, asked for a delay until after the Texas hearings on collocation, which were also delayed. (SWBT's reason for requesting this delay was to assess what impact, if any, the Eighth Circuit's TELRIC decision might have on SWBT's collocation cost studies.) The hearings were rescheduled to the end of November 2000. Id. The CLECs, including AT&T, Birch, and Sprint, again asked the KCC to delay the proceeding. Id. SWBT filed a response raising as a concern the claim filed by AT&T in the Texas proceeding that interim rates should be fatal. Id. The KCC, however, granted the CLECs' request and rescheduled the hearings for the end of January 2001.

Just as in Texas, however, the interim collocation rates provide no basis for denying SWBT's application. The KCC has made reasonable efforts to set interim collocation rates that are based on TELRIC cost studies, just as in Texas. See Texas Order ¶ 89. The rates are subject to true-up, just as in Texas. Cleek Reply Aff. ¶ 22. And the KCC has shown its commitment to comply with TELRIC. Indeed, the KCC Staff has hired an independent expert to review the TELRIC-based cost studies in the collocation proceedings. Id. ¶ 24. SWBT is clearly not responsible for the delay in establishing permanent rates.

Oklahoma. The interim rates in Oklahoma are also reasonable under the circumstances and subject to true-up. The OCC released an order on May 2, 2000, establishing interim collocation rates based on the collocation rates in SWBT's Texas tariff. These rates are subject

to true-up, and the OCC has scheduled hearings to begin on February 1, 2001, to establish permanent rates. Jones Reply Aff. ¶¶ 45-46. The OCC has also set interim rates for sub-loop elements based on the T2A rates, subject to true-up. Id. ¶ 49.

Oklahoma also has interim rates for some items related to xDSL service. The OCC has set an interim rate of zero for loop conditioning and line sharing. Id. ¶¶ 47, 49. Finally, the OCC has also set an interim rate of zero for non-recurring charges for pre-existing UNE platform combinations. Id. ¶ 49.

The OCC has expressed its concern with the uncertainty caused by interim rates and has therefore committed to establishing permanent rates for all of the above elements by March 27, 2001. Id. ¶ 51. To address the concerns of CLECs, the OCC has stated that interim rates in place after March 27, 2001 are no longer subject to true-up. Id.

II. OPERATIONS SUPPORT SYSTEMS

SWBT provides CLECs serving end-user customers in Kansas and Oklahoma with access to exactly the same operations support systems ("OSS") as those that were reviewed by this Commission in the Texas proceeding; those OSS are uniformly available throughout SWBT's five-state region. See Ham Reply Aff. ¶ 7 & n.5.¹³ In addition to handling commercial volumes of orders in Kansas, Oklahoma, and across SWBT's region, these systems have been subjected to months of testing in 1999 by an independent third party, Telcordia, operating under the supervision of the Texas Commission. Telcordia found, and this Commission agreed, that

¹³ Contrary to DOJ's implication (at 29-31), SWBT is not playing semantic games with the meaning of the word "same." As explained in this section and in the reply affidavits of William Dysart, Elizabeth Ham, Larry Mah, Brian Noland, David Smith, and Weldon McLaughlin, and as confirmed in the affidavit of Ernst & Young's Michael Kelly. (attached to Ex Parte Letter from G. Klineberg to Magalie Roman Salas (FCC filed Dec. 1, 2000)), there are no differences between the electronic and manual OSS systems and processes that are available to CLECs serving end-users in Texas, Kansas, and Oklahoma.